IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 12 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ELSON PACKAGING INDUSTRIES PVTLTD. - Petitioner(s)
Versus
M/S SABERO ORGANICS GUJARAT LTD. - Respondent(s)

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Appearance :
NANAVATI ASSOCIATES for Petitioner(s) : 1,
NANAVATI & NANAVATI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 10/04/2007

ORAL JUDGMENT

Present company petition has been filed by the petitioner Elson Packaging Industries Private Ltd. (hereinafter referred to as “the petitioning

creditor) under sections 433 and 434 of the Companies Act, 1956 (for short “the Act”) for an appropriate order of winding up of the company M/s Sabero Organics Ltd. (hereinafter referred to as “the company”).

2. It is the contention on behalf of the petitioning creditor in the petition that at the request and pursuant to various purchase orders placed by the company from time to time, the petitioner had sold, supplied and delivered various types of paper bags as per the specification under various invoices issued in the name of the company. It is submitted that the company has received the goods covered under said invoices. However, the amount of all those invoices remained unpaid. It is the case on behalf of the petitioner that the goods supplied by the petitioner were accepted and no dispute has been raised at any point of time about the price, quality and/or quantity thereof. That as per the terms of the payment agreed between the parties and specifically mentioned in the invoices, the company was to make payment for the same within 90 days from the respective date of invoices and on failure to pay the said amount before the due date,

the company was liable to pay interest at the rate of 24% per annum. It is submitted that as per the account of the company maintained in the books of the petitioning creditor, a sum of Rs.8,34,408/- is due and payable by the respondent company in respect of the goods purchased by the company. It is submitted that despite several requests to pay the outstanding amount, no payment was issued from the company and therefore, the petitioner vide his letter dated 11-8-2006 had informed the company about the outstanding payment and along with the said letter, the copies of the relevant invoices and purchase orders were enclosed. It is submitted that thereafter vide email dated 30-8-2006, the company alleged the use of inferior quality of glue/adhesive in manufacturing of the paper bags and requested for the replacement of the bags. It is submitted that in the said email, it has been mentioned that the balance payment payable to the petitioner remains under hold. It is submitted that the bags supplied by the petitioner were accepted by the quality control department of the company after a detailed inspection. Hence, the allegation of the company regarding the inferior quality of bags is false and frivolous. It is submitted that the company's suggestion regarding use of inferior

quality of material, vide its letter dated 30-8-2006 is clearly an afterthought and dishonest. It is submitted that the company has failed and neglected to make the payment and therefore, the petitioner served a notice dated 4-9-2006 upon the respondent company calling upon the company to pay to the petitioner a sum of Rs.8,43,408/- with interest at the rate of 24% per annum from respective due dates of outstanding invoices within a period of 21 days from the receipt of the said notice. It is submitted that the said notice has been served upon the respondent company. It is submitted that in response to the aforesaid statutory notice, the company vide its letter dated 15-9-2006 addressed to the advocate of the petitioner stated that “as per our record, the outstanding is nil as of today.” It is submitted that through oversight, an amount of Rs.11,769/- towards testing charges was left out to be claimed by the petitioner in the notice dated 4-9-2006, therefore, by reply-cum-notice dated 30-9-2006 not only replied to the letter dated 15-9-2006 of the company but also called upon the company to pay an amount of Rs.8,46,177/- with interest at the rate of 24% per annum on the said amount. It is submitted that in response to the same, the company through his

advocate has sent a letter dated 20-12-2006 to the advocate of the petitioner, wherein contents of the petitioner's reply-cum-notice are repudiated and it has been stated that the company would revert shortly with their reply. It is submitted that till date no other reply is received by the petitioner and the company has neglected to pay the petitioner's dues or any part thereof as mentioned in the said reply-cum-notice dated 30th September 2006. It is submitted that as on 31-7-2006, the company is liable to pay the petitioner a total sum of Rs.9,02,321/-, which the company has failed and neglected to pay in spite of the repeated demands. Therefore, it is submitted that the company is deemed to be unable to pay its debts as and when the same becomes due and payable. It is submitted that even, otherwise the company is unable to pay its dues and therefore, it is requested to admit the present company petition and thereafter allow the same and pass an appropriate order of winding up of the respondent company.

3. Petition is opposed by the respondent company. An affidavit-in-reply is filed on behalf of the respondent company affirmed by the director of the respondent company. It is submitted that the

petitioner had supplied yellow multi-wall paper bags for 25 kg to be used for packing of Mancozeb, a pesticide which is one of the products of the respondent. It is submitted that the present dispute between the petitioner and the respondent arose due to inferior quality of packing material supplied by the petitioner. It is submitted in the reply that somewhere around June 2006, respondent company started receiving complaints from its overseas customers with respect to leakage in the packing of Mancozeb. The respondents informed the petitioner about the complaints received from its customers about the substandard nature of packing material supplied to it, pursuant to which Mr. Jayesh Raut, in charge of Quality department of the petitioner visited the respondent's Sarigam factory for inspection. That he has submitted the report. It is submitted that on perusal of the same reveals various defects found in the packing material. It is submitted that the petition is required to be dismissed as the same suffers from vice of suppression of material facts. It is submitted that the petitioner company has deliberately not produced the report of the aforesaid Mr. Jayesh Raut, in charge of Quality department of the petitioner, which is a material document and it

unravels the claim of the petitioner. It is submitted that due to the hazardous nature of Mancozeb being a pesticide good quality of packing material is very essential. Because of lack of requisite quality of the packing material, the customers of the respondent started complaining about it and sought damages. It is the case on behalf of the respondent company that in view of the report of Mr. Jayesh Raut, in charge of Quality department of the petitioner company and complaints received by the respondent from its customers it clearly transpires that the petitioner has supplied substandard material to the respondent and the same issue was timely taken up by the respondent. It is also the case on behalf of the respondent company that due to the substandard nature of packing material supplied by the petitioner, the respondent has suffered not only financial loss but also loss goodwill among its international clients. It is further submitted that in fact, a couple of customers of the respondent company had asked to supply fresh bags for which the respondent had to incur an additional cost of Rs.1,19,505/-. It is further submitted that instead of redressing the grievance of the respondent, the petitioner has filed the present petition suppressing material document

and therefore, the present petition is required to be dismissed in limine.

It is also further submitted that the respondent company is a profit making company and is also a listed company on the National Stock Exchange as well as on the Bombay Stock Exchange. It is submitted that the respondent is regularly paying to its creditors and employees including tax authorities. It is submitted that the company has reserves in excess of Rs.15 crores and net current assets of Rs.45.86 crores for the year ended on 31-3-2006. It is submitted that in the financial year 2005-06, the company has redeemed secured non-convertible debentures worth of Rs.8.14 crores for an amount of Rs.6.33 crores. It is submitted that the company has enough financial strength not only to sustain its business but also to earn profits for its shareholders. Therefore, it is requested to dismiss the present petition. It is submitted that as per the respondent is a profit making company and there is a genuine dispute with the petitioner for the alleged debt, it is requested to dismiss the company petition.

4. In affidavit-in-rejoinder, it has been submitted

on behalf of the petitioner that from the contents of the various emails purporting to be the complaints from the customers of the respondent, it is clear that the paper bags mentioned therein are different from the paper bags supplied by the petitioner to the respondent company. It is submitted that the said complaints do not pertain to the paper bags supplied by the petitioner and therefore, are not required to be considered by this Court. With reference to the visit report dated 12th June 2006 of Mr. Jayesh Raut, in charge of Quality department, it is submitted that the same refers to a minor adhesive problem and not to inferior quality of paper or other materials with respect to paper bags supplied by the petitioner. It is submitted that the respondent company is trying to raise a false and frivolous dispute. It is further submitted that the goods supplied by the petitioner were well accepted by the respondent from time to time without raising any complaint with regard to quality or quantity during the months of June and July 2006 and the petitioner cannot be made responsible for subsequent repacking of its goods in inferior quality of packaging material and export of the same.

5. Shri Nandish Chudgar, learned advocate appearing on behalf of the petitioner by making above submission has submitted that the dispute is not a bona fide and genuine dispute. It is submitted that even after the complaints, there are six deliveries and the respondents have accepted the goods. It is also further submitted that the payment due is towards good supplied after the complaints. It is also further submitted that the alleged dispute is with regard to only 25 kg bags and therefore, with regard to 50 kg bags, there is no justification for not making the payment towards supply of 50 kg bags. Shri Chudgar has relied upon the decision of this Court in the case of **Ficom Organics Ltd. V. Laffans Petrochemicals Ltd.** reported in **2000(99) Company Cases 471** and has submitted that as held by the learned Single Judge, the defence must be substantial and not mere moonshine. It is submitted that as held by this Court, after the notice is issued in the company petition to show cause why the petition should not be admitted and if the company disputes the debt, the Court is required to hold a summary inquiry and the company has to prima facie prove all the facts on which the defence rests. It is further

submitted that at the admission stage, the Court is required to give its findings on the aspect whether the petitioning creditor is a creditor to whom the company owes an ascertained sum of money or substantially ascertained sum of money; whether the said debt is within limitation; whether the defence of the company is valid or bona fide or whether it is mere moonshine. It is submitted that in short, the Court is required to decide in a summary manner whether the company is ready to pay the petitioner an ascertained sum of money or substantially ascertained sum of money. It is submitted by Shri Chudgar that when the dispute is a mere afterthought, an adverse inference may have to be drawn against the company that the defence being an afterthought, is a mere cloak to cover up its inability or refusal to pay. It is further submitted by him that as held by the learned Single Judge of this Court in the aforesaid decision, after considering the material on record and after holding summary inquiry as stated above, if the Court comes to the conclusion that the defence raised by the company is not only not bona fide, but the defence is reeking with mala fides or the company's conduct leading to the dispute was dishonest, the Court would admit the petition and

pass an order for advertisement. Relying upon the aforesaid decision in the case of Ficom Organics Ltd. (supra) and the observations in the said decision, it is requested to admit the present company petition and pass an order for advertisement as according to the petitioner, the dispute is not bona fide and is an afterthought and dishonest.

6. In reply, Shri SI Nanavati, learned senior advocate appearing on behalf of the respondent company has submitted that the present petition is required to be dismissed on the ground of suppression of material fact and for making the false statement. It is submitted that in the petition as well as in the affidavit-in-rejoinder, it has been stated that the respondent company has never raised any dispute with regard to price, quality and quantity thereof till the email dated 30-8-2006. However, the same is factually incorrect. It is submitted that right from June 2006, the respondent company started receiving complaints from his customers and the attention of the respondent company was drawn and therefore, Mr. Jayesh Raut, in charge of Quality department was deputed and he submitted inspection report and the defects were found. Therefore, it is submitted that

it is not that no dispute with regard to quality was ever raised prior to 30-8-2006. It is submitted that as winding up order is a discretionary relief, it is requested not to exercise the discretion in favour of the petitioner who has not come with clean hands and has not produced the inspection report of Mr. Jayesh Raut, in charge of Quality department of the petitioner company which is a vital document. It is also further submitted by him that the quality of the goods are found not up to the mark. It is also further submitted that part payment is already made and because of the aforesaid dispute, further payment was not made. It is submitted that even as per the petitioner and as stated in the affidavit-in-rejoinder, the defects are minor defects. According to the respondent, the same are major defects. Therefore, whether they are minor defects and/or major defects, is a question to be decided in a civil Court on leading the proper evidence and on appreciation of the evidence. It is further submitted that even a criminal complaint is already filed for the same transaction by the petitioner against the company and the directors. It is also further submitted that looking to the sound financial condition and the statement of accounts and the

balance-sheet produced on record, it cannot be said that the respondent company is unable to pay its debts and/or financially unsound and/or has lost the financial substratum, which warrants an order of winding up.

7. Shri Nanavati has relied upon the decision of this Court in the case of **American Express Bank Ltd. V. Core Health Care Ltd.** reported in **(2000) 6 Comp LJ 98 (Guj)**, more particularly, para 8 and 21 of the said decision. It is submitted by him that as held by this Court in the aforesaid decision, in the matter of the petition for winding up on the ground that the company is unable to pay its debts, the Court has to bear in mind that winding up petition is not an alternative to the ordinary procedure for realization of the debts due from the company, and the mechanism of winding up process is not to be used as a pressure tactic for enforcing realization. For that the appropriate remedy is to seek enforcement under the ordinary law through remedies provided there. It is further submitted that as held by this Court, the remedy provided under section 433 has been held to be discretionary. Shri Nanavati has submitted that what

is envisaged under section 433(1)(e) is not inability to pay a **particular debt**, but inability to pay its debts. It is submitted that as held by this Court, mere inability to pay particular debt by itself cannot be held to be sufficient to pass an order of winding up *ex debito justitiae*. Therefore, it is submitted that when there are bona fide disputes and the financial condition of the respondent company is sound and is a profit making company, it is requested to dismiss the present company petition.

8. Heard the learned advocate appearing on behalf of the parties.

It is the case on behalf of the petitioner that a sum of Rs.8,43,408/- with interest at the rate of 24% per annum is due and payable by the respondent company towards goods supplied by the petitioner to the respondent company and that the respondent has accepted the said goods and no dispute has been raised at any point of time about the price, quality and quantity thereof. It is also the case of the petitioner that in spite of the statutory notice, the amount has not been paid and that the respondent company is unable to pay its debts/dues and

therefore, the same is required to be wound up. It is also the case on behalf of the petitioner that the dispute with regard to the quality, which has been raised by the respondent company is an afterthought and dishonest and not bona fide. It is also the case on behalf of the petitioner that the alleged disputes with regard to quality are all minor defects. On the other hand, it is the case on behalf of the respondent company that the petitioner has not come with clean hands and has withheld the vital documents i.e. the inspection report of Mr. Jayesh Raut, in charge of Quality department and has also made false statement to the effect that the respondent company has never raised any dispute with regard to the quality at any point of time prior to 30th August 2006. It is also the case on behalf of the respondent that there are bona fide disputes with regard to quality and that the respondent company is financially sound company and is a profit making company. Now on going through the relevant record and the documentary evidence on record, it appears to the Court that there were some disputes with regard to quantity of the goods supplied by the petitioner even prior to 30-8-2006. The complaints were received by the respondent company from its customers and the

attention of the petitioner company was drawn to the said complaints and therefore, the petitioner company deputed their representative Mr. Jayesh Raut, in charge of Quality department and said Jayesh Raut submitted the visit report which reads as under:

1) Seam Pasting open from Center.
2) Adhesive Pasting on three P4 not properly done and not properly stick.
3) Some bag Adhesive Pasting is there but not stick properly.
4) U.N. Number should be slightly on bottom side required.
5) Bottom Flap often open from bottom sides.
6) To avoid the above problem, we will develop some other Adhesive so bag will not burst from side seam. I assure that in further supply the above problem will not observed.

It is required to be noted that the said visit report is dated 12th June 2006. Therefore, the contention on behalf of the petitioner that till 30-8-2006, no complaints were made by the respondent company with regard to quality is factually incorrect. The petitioner company has not produced on record the visit report of said Shri Raut. The petitioner company has not only made the incorrect

statement in the petition as well as in the affidavit-in-rejoinder that no dispute has been raised at any point of time about the price, quality and quantity thereof but has also withheld the vital document i.e. visit report of Mr. Jayesh Raut, in charge of Quality department of the petitioner company, which would suggest that even prior to 30-8-2006, more particularly, in the month of June 21006, there were complaints with regard to quality. Thus, it appears to the Court that the petitioner has not come with clean hands and/or has suppressed the material fact.

9. It is the case on behalf of the petitioner in the affidavit-in-rejoinder that the alleged defects are minor defects with regard to glue/adhesive, against which it is the case on behalf of the respondent that the defects are not minor defects but they are major defects. Whether the defects are minor or major are not required to be considered by this Court while considering the winding up petition and the same are required to be proved and established by the respective parties by leading proper evidence in a proceedings before appropriate forum, more particularly, the civil suit in the civil Court, as

the same would be disputed question of facts. On considering the dispute raised on behalf of the respondent and the defence, it cannot be said that the disputes which are raised are mala fide disputes and/or lack of bona fide. It is also required to be noted that even considering the balance sheet and the annual report, the respondent company is a running and profit making company and their net profit for the period ended on 31-12-2006 is 101.86 crores and their gross sales as on 31-12-2006 is of Rs.4281.96 lacs. It has also come on record by way of admitted balance sheet that the company has reserves in excess of Rs.15 crores and the net current assets of Rs.45.86 crores for the year ended on 31-3-2006. It has also come on record that in the financial year 2005-06, the company has redeemed secured non-convertible debentures worth of Rs.8.14 crores for an amount of Rs.6.33 crores. Thus, it cannot be said that the financial position of the respondent company is such that the same is not in a position to pay dues to its creditors and/or that the respondent company has lost its financial substratum.

10. Now, in backdrop of the above facts, the decision relied upon by the learned advocate

appearing on behalf of the petitioner are required to be considered. It is the submission on behalf of the learned advocate appearing on behalf of the petitioner relying upon the decision of this Court in the case of Ficom Organics Ltd. (supra) that the defence must be substantial and not mere moonshine and the Court is required to hold a summary inquiry with regard to defence of the respondent company at the initial stage of the winding up petition and as the defence raised on behalf of the respondent company is mala fide and is nothing but an afterthought, the present company petition is required to be Admitted. The learned advocate appearing on behalf of the petitioner has heavily relied upon the decision in the case of Ficom Organics Ltd. (supra). It is required to be noted that this Court in Ficom Organics Ltd. (supra) has also considered the decision of this Court in the case of Core Health Care Ltd. (supra), which has been relied upon by the learned advocate appearing on behalf of the respondent company. However, the learned Single Judge has categorically made it clear that the discussion in Ficom Organics Ltd. (supra) is confined to only that category of winding up petitions where the company asserts that it is able

to pay its debts, but disputes the particular debt of the petitioner. Thus, the observations of this Court in Ficom Organics Ltd. (supra) is required to be considered and confined to only that category of winding up petitions where the company asserts that it is able to pay its debts, but disputes the particular debt of the petitioner. Even, otherwise on considering the documentary evidences on record and this Court is of the opinion that the disputes raised on behalf of the respondent company with regard to quality are prima facie seems to be bona fide and/or genuine and complaints were right from June 2006. In any case, the disputes and the defence raised on behalf of the respondent company are not mala fide.

11. In the case of ***Pradeshya Industrial and Investment Corporation of Uttar Pradesh Vs. North India Petro Chemical Ltd. And Another,[supra],*** the Supreme Court has held that, ***"A debt for the purpose of Section 433(e) of the Companies Act must be a determined or a definite sum of money payable immediately or at a future date."*** In the said Judgment,the Hon'ble Supreme Court considered the following observations of the Hon'ble Supreme Court

made in ***Madhusudan Gordhandas and Co.[1972] 42 Comp.Cases 125;***

> ***"Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See London and Paris Banking Corporation, In re [1875] LR 19 Eq.444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Brighton Club and Norfolk Hotel Co.Ltd., In re [1865] 35 Beav. 204).***
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> ***Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company choses not to pay that particular debt. (See A Company, In re [1894] 94 SJ***

369; [1894] 2 Ch 349 (Ch D)). Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. (See Tweeds Garages Ltd., In re [1962] Ch 406; [1962] 32 Comp Gas 795 (Ch D)). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding-up order by the creditors the court will consider their wishes and may decline to make the winding-up order. Under section 557 of the Companies Act, 1956, in all matters relating to the winding-up of the company the court may ascertain the wishes of the creditors. The wishes

of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st edition, page 742, as follows :

"This right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some goods reason, they object to a winding-up order, the court in its discretion may refuse the order.'

The wishes of the creditors will, however, be tested by the court on the grounds as to whether the case of the persons opposing the winding-up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding -up order is made. It is also well-settled that a winding-up order will not be made on a creditor's petition if it would not benefit him or the

company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case. (See P & J. Macrae Ltd. In re [1961] 1 All ER 302; [1961] 31 Comp Case 424 (CA).”

It is beyond dispute that the machinery for winding up will not be allowed to be utilized merely as a means for realising its debts due from a company. In Amalgamated Commercial Traders (P.) Ltd. vs. Krishnaswami (A.C.K.)[1965] 35 Comp Cas 456, 463 (SC) this court quoted with approval the following passage from Buckley on the Companies Acts, 13th edition, page 451 :

“It is well-settled that a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances may be

stigmated as a scandalous abuse of the process of the court."

12. Similar view has been expressed by the Hon'ble Supreme Court in the case of ***Mediqup Systems Pvt.Ltd. [supra],*** and the Hon'ble Supreme Court has observed that, *An order under section 433(e) of the Companies Act, 1956 is discretionary. There must be a debt due and the company must be unable to pay it.* It is further observed that, *A debt under this section must be a determined or definite sum of money payable immediately.* It is also held that if the debt is bona fide disputed and the defence is a substantial one, the court will not pass an order of winding up the company. The Division Bench of this Court also in the case of ***Tata Iron & Steel Company Ltd. v. Micro Forge (India) Ltd., [supra]*** has laid down certain general principles in a case of winding-up proceedings and after considering various decisions of the Hon'ble Supreme Court, more particularly in the case of ***Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt.Ltd. [supra]; Harinagar Sugar Mills v. Court Receiver, H.C. Bombay, AIR 1966 SC 1707; Pradeshiya Industrial & Investment Corporation***

of U.P. vs. North India Petrochemicals Ltd. 1994 (3) SCC 348, the judgment of the learned Single Judge of this Court in the case of ***American Express Bank Ltd. v. Core Health Care Ltd. 1999 (96) Comp.Cases 841;*** and another decision of this Court in the case of ***Ashok Fashions vs. Magdoot Acid & Chemicals (Guj.), 1998 (91) Comp.Cases 655,*** the order passed by the learned Single Judge admitting the winding up petition came to be set aside by holding that when there exists bona fide disputes and the dues are not admitted the winding-up petition is required to be dismissed.

13. Considering the overall facts of the case and the disputes raised and debt is not admitted and considering the financial condition of the respondent company and that the respondent company is a running and profit making company and that the petitioner has not come with clean hands and has withheld and/or not produced the vital documents i.e. inspection report of Mr. Jayesh Raut, in charge of Quality department of the petitioner pointing out certain defects (minor of major), it cannot be said that the respondent company is required to be ordered to be wound up as

the same is unable to pay its debts/dues.

14. Under the circumstances, the present petition is required to be dismissed and is accordingly dismissed. No costs.

(M.R. Shah, J.)

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